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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 200

NORMAN H. STONE, MARVIN H. STONE AND JEROME H. STONE, JR., DOING BUSINESS AS J. H. STONE & SONS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 285–294) is reported in 125 F. (2d) 752. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 43–65) are reported in 33 N. L. R. B., No. 180.

JURISDICTION

The decree of the court below (R. 329–331) was entered on April 8, 1942. The petition for a

writ of certiorari was filed on July 3, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's order abridges petitioners' freedom of speech in violation of the First Amendment.

2. Whether, upon findings that petitioners had caused their employees to enter into individual employment contracts as part of a "program" adopted by petitioners to forestall unionization and that the contracts contained an illegal "adjustments" clause, the Board may validly order petitioners to cease and desist from giving effect to the contracts "or to any modification, continuation, extension, or renewal thereof, or entering into any similar form of contract with their employees for any period" subsequent to the Board's decision.

3. Whether the Board's findings that petitioners engaged in unfair labor practices in violation of Section 8 (1) are supported by substantial evidence.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, p. 18.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 43–65). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

On August 4, 1939, the Union[2] presented to petitioners' attorney, Shaeffer, signed union membership cards and a proposed contract, and requested that petitioners recognize the Union as exclusive bargaining agent (R. 47; 67–68). Shaeffer counted the cards, conceded that the Union had a majority, and requested the union representative to return on August 7 for petitioners' answer concerning the questions of recognition and the proposed contract (R. 47; 68, Typ. Orig. Trans. of Rec. 27–28[3]).

Immediately after this August 4 meeting, however, petitioners embarked upon what the Board found to be a "program" (R. 53, 56) to defeat the Union. The next day, August 5, petitioners assembled their employees to hear a speech by peti-

[1] The petitioners' statement (pp. 12–26) departs in major respects from the facts found by the Board and recites as facts evidence rejected by the Board.

In the following statement, the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

[2] International Printing Pressmen and Assistants' Union, Box and Carton Local No. 415, affiliated with the A. F. of L.

[3] The typewritten original transcript of record is on file with the Clerk of this Court.

tioners' newly retained counsel, L. F. Jacobson, who thereafter represented petitioners in labor matters (R. 47; 87, 134, 140–141). Jacobson addressed the employees at length; while he read the Act in full and stated that employees were free to join or not join a union, he cited statistics on lost working time caused by strikes, told the employees that they could bargain individually as well as collectively, and announced that petitioners would grant vacations with pay (R. 47; 88, 95, 108–109, 137, 140). At the same meeting Jacobson had the employees mark ballots selecting "monitors" who, among other things, were to act as employee representatives in handling grievances (R. 47–48; 84, 89–90, 104, 109, 123).

On Monday, August 7, when the union representative communicated with Attorney Shaeffer to obtain petitioners' answer to the Union's request of August 4, Shaeffer told him that "everything was off, that he wouldn't have anything further to do with" the Union (R. 49; 68).

The Board found that Jacobson's speech of August 5 was petitioners' "answer" to the Union's request for recognition made the previous day; that petitioners' purpose in taking a vote to elect monitors was to create grievance machinery in place of that proposed by the Union; and that Jacobson's citation of lost-time statistics and petitioners' granting of vacations with pay were intended to cause the employees to abandon the Union (R. 48–49).

Promptly after Jacobson's speech, petitioners took steps to institute a system of individual bargaining for the employees. On August 7, Superintendent Snyder caused individual employment contracts to be distributed inside the plant by foremen and others, which were signed by 107 of 152 employees (R. 49–52; 69, 84, 90–91, 129, 138, 148–150, 159). The contracts contained, among other terms, an "adjustments" clause[4] which, the Board found, was itself in violation of the Act (R. 54).[5] Shortly after the contracts were signed, petitioners granted a general 8 percent wage increase (R. 52; 158). The Board found that petitioners'

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[4] The "adjustments" clause read as follows (R. 150):

"Adjustments. The Company will endeavor to adjust with the Employee all complaints and disputes by negotiation, if possible. If it cannot be so adjusted, the Employee hereby selects * * * as his representative and arbitrator, and the Company selects its superintendent as its representative, and they shall promptly hear and adjust all such complaints, or failing to do so shall select a third disinterested arbitrator, which three shall promptly hear, adjust and arbitrate every such complaint or dispute. The decision of a majority of such Board to be final on both Employee and Employer."

[5] The Board pointed out, "The terms of this provision preclude an employee from dealing with the respondents through a representative until after there has been an attempt at settlement of the dispute by direct dealing between the respondents and the individual employee. The effect of this restriction is that, at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer" (R. 54).

introduction of individual contracts within 3 or 4 days after the Union's request for bargaining, coupled with the unsolicited granting of vacations with pay and wage increases, made plain to the employees that petitioners desired them to bargain individually and not collectively, and "was the second step in [petitioners'] program to defeat the unionization of the plant" (R. 52, 53). In further substantiation of its finding, the Board pointed out that petitioners' attorney subsequently treated the individual contracts as having supplanted and superseded the Union's membership application cards (R. 52; 69).

In 1940 and 1941, petitioners distributed individual contracts substantially identical with the 1939 contract, which were signed by 144 out of 163 employees in 1940, and 45 out of 201 employees up to the date of the hearing in 1941 (R. 52–53; 138, 151–155, 160–161); the Board found that the employees when signing these contracts had no reason to believe that petitioners had receded from their antiunion policy, and that these contracts similarly were the result of petitioners' prior unfair labor practices (R. 53–54).

In March 1940, the Board directed that a hearing be held upon a petition for investigation and certification of representatives filed by the Union under Section 9 of the Act (R. 56; 162). On March 15, six days before the hearing, each employee was individually summoned to petitioners'

office during working hours and questioned by petitioners' attorneys concerning his membership in the Union, whether he wanted the Union to represent him, and whether he had signed the individual contract (R. 55; 77–78, 85–86, 92, 100–102, 105, 110–111, 141–143). The answers were reduced to writing and the employee was requested to sign the statement (R. 55; 93, 101–102, 111). The Board found that the purpose of the interrogation was "to coerce and intimidate [the employees] on the eve of a Board hearing" and was "another step in the [petitioners'] program to perpetuate a system of individual contracts with their employees and to interfere with the exercise of the rights guaranteed their employees by Section 7 of the Act" (R. 56).

As a result of the Union's representation petition a Board election was ordered to be held on May 8, 1940 (R. 57; 282, 283). On May 3, ostensibly in answer to questions which had been asked by employees and to campaign literature circulated by the Union, petitioners sent a letter to all their employees (R. 57; 130, 145–148, 156–159). The letter extolled the existing individual contracts, was generally unfavorable to unions, and asked whether "an outside organizer" could give them more than the company had given them and why the employees should "pay an outsider" to adjust grievances (R. 57–60; 156–159). The Board found that the timing of the letter five days

before the Board election and the implications of its text, considered in the light of petitioners' other illegal activity, disclosed that the purpose of the letter was further to interfere with self-organization and to influence the employees to vote against the Union (R. 61).[6]

The Board concluded that by Jacobson's speech to the employees on August 5, 1939, and the proceedings at that meeting; by causing their employees to sign individual contracts in 1939, 1940, and 1941; by questioning their employees concerning their union affiliation in March 1940; and by sending to their employees the letter of May 3, 1940, petitioners had interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7, contrary to Section 8 (1) of the Act (R. 62, 64). The Board's order directed that petitioners cease and desist from interrogating employees concerning their union affiliations or activities; cease giving effect to the indvidual contracts "or to any modification, continuation, extension, or renewal thereof, or entering into any similar form of contract with their employees for any period subsequent to the date of this decision"; cease and desist from in any other manner interfering with the rights guaranteed in Section 7 of the Act; notify in writing each employee who had signed an individual con-

[6] The Union lost the election 101 to 59 (R. 61; 113).

tract that it would not be enforced; and post appropriate notices (R. 64–65).

Thereafter the Board filed in the court below a petition for enforcement of its order. On February 17, 1942, the court handed down its opinion enforcing all of the Board's order except the provision enjoining petitioners from "in any other manner" interfering with the rights guaranteed in Section 7, and making one other modification not here material (R. 294). Respective petitions for rehearing filed by petitioners and by the Board were denied on March 9, 1942 (R. 296–314, 316–323, 324) and a decree in accordance with the court's opinion was entered on April 8, 1942 (R. 329–331).

ARGUMENT

The petition for certiorari comprises in considerable part a renewal of contentions made in the petition for certiorari in *Superior Tanning Co.* v. *National Labor Relations Board*, No. 784, October Term, 1940, certiorari denied, 313 U. S. 559. That case involved similar unfair labor practices including introduction by the employer, who was represented by the same attorney as here, of individual contracts to forestall collective bargaining. As in the *Superior Tanning* case, petitioners' contentions do not warrant further review by this Court.

1. Petitioners contend (Pet. 20–41) that the Jacobson speech on August 5, 1939, the interroga-

tion of employees concerning union affiliation on March 15, 1940, and the antiunion letter of May 3, 1940, are protected by the constitutional right of free speech. But, despite petitioners' assertion to the contrary (Pet. 38), these events, as the Board found upon substantial evidence, were part of a whole "program" (R. 53, 56; *supra,* pp. 3, 6, 7) adopted by petitioners to defeat unionization of their plant. In this case, unlike the Board's finding with respect to the ambiguous bulletin involved in *National Labor Relations Board* v. *Virginia Electric & Power Co.,* 314 U. S. 469, upon which petitioners rely, the Board's conclusion concerning the coercive nature of the speech, interrogation, and antiunion letter was "based on the totality of the Company's activities during the period in question" (314 U. S., at 477). Petitioners' claim of conflict with the *Virginia Electric* case, predicated on the theory that the Board considered the events in isolation, is therefore mistaken.

A contention similar to that urged by petitioners, that the First Amendment protects employer conduct found illegal by the Board, was advanced by the employers in *North Electric Mfg. Co.* v. *National Labor Relations Board,* No. 931, last Term, certiorari denied, March 16, 1942; *Norristown Box Co.* v. *National Labor Relations Board,* No. 993, last Term, certiorari denied, April 13, 1942; and *Algoma Net Co.* v. *National*

Labor Relations Board, No. 1256, last Term, certiorari denied, June 8, 1942. As in those cases, the validity of the contention here depends upon an issue of fact, i. e., whether petitioners' conduct may fairly be deemed to have constituted interference with, coercion, or restraint of the rights guaranteed to their employees by Section 7 of the Act. The right of free speech does not include the right to coerce employees, through speech or otherwise. *National Labor Relations Board* v. *Virginia Electric & Power Co., supra,* at 477. Here, as the court below pointed out, "the events, as a whole, sustain the Board's conclusion. The rapidity with which one event followed another, the manner in which they were timed with reference to each other, as well as the numerous covert suggestions, in themselves, lend persuasive support to the Board's conclusion. * * * It may be that the time of some of these happenings was merely coincidental, but it is not reasonable to think that they all occurred as they did except as a part of a plan to interfere with the rights of the employees as provided in Section 7 of the Act" (R. 292). Since petitioners' actions interfered with their employees' rights of free choice, they were illegal.

Petitioners also claim conflict (Pet. 38–39) with *National Labor Relations Board* v. *Ford Motor Co.,* 114 F. (2d) 905 (C. C. A. 6), certiorari denied (employer's petition), 312 U. S. 689. The identi-

cal claim was made in the petition for certiorari in the *Superior Tanning* case (*supra,* p. 9), and is invalid for the reasons set forth in our brief in opposition in that case (No. 784, October Term, 1940, pp. 9–11). In any event, the law is now settled by the *Virginia Electric* case; the instant decision is in accord with that case.

2. The Board found that the individual contracts were entered into as a result of petitioners' unfair labor practices and were also illegal because they contained the "adjustments" clause (R. 52–55). The Board further found that continued enforcement of the contracts would leave the employees subject to "the restraint and interference resulting from the imposition upon them of these illegal contracts" (R. 63).

Petitioners urge (Pet. 41–50) that the "adjustments" clause is not illegal *per se.* But even if that contention is correct, it is immaterial, since the Board's requirement that petitioners cease giving effect to the contracts is independently supported by the finding that the contracts were the fruits of petitioners' unfair labor practices. *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350. In that case the individual contracts between the employer and its employees were "found to have been procured in violation of the National Labor Relations Act, and to contain provisions violating that Act * * *"

(309 U. S., at 351; see 359–360). It is plain that the Court deemed either defect in the contracts sufficient to warrant the Board's remedial order. The Court stated (at p. 361):

> Since the contracts were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act, they were appropriate subjects for the affirmative remedial action of the Board authorized by § 10 of the Act.

And the Board's order was sustained because its effect was only to preclude the employer "from taking any benefit of the contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act" (at p. 365).

In the present case, the contracts similarly resulted directly from the employer's interference with the rights guaranteed employees in the Act and were the instruments by which such interference was continued. In these circumstances, the order was well within the Board's power to restore conditions permitting free exercise of the rights of self-organization and collective bargaining. The *National Licorice* case, *supra; Interna-*

tional Association of Machinists v. *National Labor Relations Board*, 311 U. S. 72, 82; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236.

In any event there is no merit in petitioners' contention (Pet. 41–50) that the concurrent holdings of the Board (R. 54–55) and the court below (R. 292–293) that the "adjustments" clause in the individual contracts was illegal *per se* are in error. For the reasons stated by the Board (*supra*, p. 5, note 5) and by the court below (R. 293), the finding of illegality *per se* is clearly proper.[7]

3. Petitioners contend (Pet. 51) that the Board could not order them to cease giving effect to "any modification, continuation, extension, or renewal [of the contracts found to be invalid] or * * * any similar form of contract with their employees for any period subsequent to the date of this decision" (R. 64). This contention is

[7] Petitioner claims conflict (Pet. 47) with *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. But the recognition given to individual contracts in that case (p. 45) obviously does not protect such contracts which are the fruits of unfair labor practices, nor protect a clause in such contracts which involves "the renunciation by the employees of rights guaranteed by the Act" (the *National Licorice* case, *supra*, at 361). This is also true of the claim of conflict with cited decisions of other circuit courts of appeals (Pet. 48–50).

identical with that raised in the petition for certiorari in the *Superior Tanning* case (*supra,* p. 9), which is answered in our brief in opposition therein (pp. 14–15).

As we stated there, this provision is a proper effectuation of the "salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426, 436. The provision does not, as petitioners assert, "deprive petitioners and their employees of their constitutional right to contract" nor constitute "a perpetual injunction against an employer executing individual contracts" (Pet. 51). Read in its context, the challenged provision forbids only contracts which are subject to the infirmities which rendered continued enforcement of the 1939, 1940, and 1941 contracts inconsistent with the Act's guarantees. Any "modification, continuation, extension, or renewal" of these very contracts would plainly continue the effects of the unfair labor practices which originally brought about the execution of the contracts (see R. 63). "Any similar form of contract", as the court below stated (R. 294), refers to a contract containing an adjustment clause of the same effect as the illegal one contained in the instant contracts. The language of

the challenged provision is "formed and phrased to prevent" evasion of the order (*National Labor Relations Board* v. *Pure Oil Co.*, 103 F. (2d) 497, 498 (C. C. A. 5)); it is a reasonable safeguard designed "to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past." *National Labor Relations Board* v. *Express Publishing Co., supra,* at 436–437.

4. Petitioners' final contention, that the Board's findings are not supported by substantial evidence (Pet. 52–54), raises no question of general importance. In any event, the evidence supporting the findings, which is summarized in the Statement (*supra,* pp. 3–9), is plainly substantial and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 229. That the record may contain some contrary evidence is not material. *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.,* No. 774, last Term, decided April 27, 1942.

CONCLUSION

The decision below, insofar as it sustained the Board's findings and order, is correct and presents neither a conflict of decisions nor any

question of general importance. The petition should, therefore, be denied.

Respectfully submitted.

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